

## ***9 Official Opinions of the Compliance Board 246 (2015)***

- ◆ **1A(3) PUBLIC BODY: PRIVATELY INCORPORATED AND PRIVATELY –  
CONTROLLED ENTITY NOT A PUBLIC BODY**
- ◆ **7D COMPLIANCE BOARD: UNABLE TO ASSESS WHETHER  
PRIVATELY-GOVERNED ENTITY IS ACTUALLY OPERATED  
UNDER GOVERNMENT CONTROL**

**\*Topic numbers and headings correspond to those in the Opinions Index (2014 edition) at  
[http://www.oag.state.md.us/Opengov/Openmeetings/OMCB\\_Topical\\_Index.pdf](http://www.oag.state.md.us/Opengov/Openmeetings/OMCB_Topical_Index.pdf)**

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July 30, 2015

Re: Garrett County Development Corporation  
*Michael Bell and others, Complainants*

A complaint submitted by Michael Bell and eighteen other individuals (“Complainants”) alleges that the Garrett County Development Corporation (“GCDC”) “is a public body subject to the provisions of the Maryland’s Open Meetings Act” and that the GCDC has excluded the public from its meetings. Specifically, Complainants allege that the GCDC, which was incorporated in 1961 as a non-profit corporation by five individuals, “is under county control.” In response, the GCDC argues that it is not a “public body” under the Act and that it is “no different than any other private non-profit organization whose mission is to benefit some aspect of the community in which it operates, even if a government agency performs some similar functions.”

Our inquiry is complicated by the somewhat convoluted history of this entity. Certainly, its predecessor organization, the Garrett County Committee on Economic Development, would have been a public body under one of the Act’s definitions of the term; that committee was created in 1959 by an act of the General Assembly, and the committee’s five members were appointed by the Board of County Commissioners of Garrett County. As initially formed two years later, the GCDC might also have been a public body; it was incorporated by the same five people whom the commissioners had appointed to the committee, and the county once listed the GCDC and those members in the Maryland Manual as a part of the county government. As the GCDC is now constituted, however, the county does not have a role in its governance. We stress that we have relied on the bylaws as revised in

2013. We therefore express no opinion on whether the GCDC was subject to county governance while the GCDC participated in developing the plan that the commissioners adopted in 2011.

We also do not know the extent to which the bylaws, which suggest that the GCDC is divorced from County governance, reflect the reality. Certainly, the GCDC's use of County office space and County staff suggest some measure of County influence over the GCDC, and, certainly, those facts give the GCDC the appearance of a County entity, but the terms of that arrangement, spoken or unspoken, are unknown to us at this time. No prior versions of the GCDC's bylaws showing County control were submitted for review. County control by use of appointment powers over the GCDC's membership, board positions, or policy decisions is simply not present and distinguishes this case from *Andy's Ice Cream, Inc. v. City of Salisbury*, 125 Md. App. 125 (1999).

So, although we acknowledge, and will address below, the Complainants' concern with the degree to which the county has delegated seemingly legislative functions to what is now a private organization of 68 members, we find from the information available to us that the GCDC is not subject to the Act, since it changed its bylaws to eliminate the voting rights of its ex officio governmental-official members. In reaching this conclusion, we apply, to the limited facts available to us, the Maryland courts' guidance that governmental control over the governance of a private entity is key to determining its status as private or public. At the same time, we repeat the caution given by the Maryland Court of Special Appeals that "the private corporate form may not be used as a parasol to avoid the statutorily-imposed sunshine of the Open Meetings Act." *Andy's Ice Cream, Inc.*, 125 Md. App. at 155.

We encourage governing bodies, when outsourcing governmental functions to private entities, to consider whether the delegation of the particular function should include a duty of transparency. That is particularly so here, where it appears that County employees perform duties for a privately-controlled entity in County office space and where the County and GCDC websites link to each other without differentiation as to entity. It is no wonder that the public might perceive this entity to be an arm of the County government.

We additionally note that the county commissioners are all currently ex officio members of the GCDC. While there has been no allegation that a quorum of the board of county commissioners attended the GCDC's meetings, the GCDC's stated corporate purposes are so related to county business that the presence of a quorum of the county board at a GCDC meeting could well make the event subject to the Act as a county board meeting.

### **Allegations and Response**

The complaint alleges that the GCDC “operates to carry on public business,” that it has “developed the economic development policy for Garrett County for nearly 20 years, without any input or participation from the general public,” and that the GCDC privately developed the county’s 2011 “Economic Development Strategic Plan” for adoption by the county. The complaint states that the GCDC’s development of the plan evidences “a delegation of authority by county government to the GCDC, to draft a measure to set public policy, overseen by the County Commissioners as Board members of the Corporation, and with county staff coordination and involvement.” The complaint states that the county’s director of economic development executed articles of revival for the GCDC after its charter had been forfeited for failure to file a particular tax return in 2003, that the GCDC uses that county department’s address as its own, and that appointment to the GCDC “is automatic by virtue of holding the office of County Commissioner or by being appointed by the county as an employee” of the department or “other related county agency.” “In essence,” the complaint states, “this private corporation was organized and has functioned as an extension of the Garrett County Office of Economic Development.”

Included with the complaint are exhibits that include references to the GCDC’s administration of grants for the county, a 2008 county planning document that describes the GCDC as a “semi-public” entity, and the 2011 economic plan. That 65-page plan describes the development of the plan by the GCDC, the Garrett County Chamber of Commerce, Garrett College, the Garrett County Community Action Committee (a private nonprofit corporation), and the county’s economic development department. The plan assigns various roles to these five “institutions.” For example, the plan states that the GCDC and the county department will “support towns and unincorporated areas in planning and finding funding” for trails and sidewalk expansion, that the Community Action Committee will “lead collaborative efforts on childcare options,” that the GCDC will develop a pilot leadership academy, that the county department and two institutions, not including the GCDC, will offer courses and consulting support to local businesses, that the county department and the Chamber of Commerce will coordinate various staffing responsibilities, and that, if resources allow, all five institutions will establish a small business support center. The plan additionally assigns tasks to the “UMD Extension Office.”

The plan assigns to the GCDC alone the duty to “[e]stablish and support a business leaders’ circle which identifies regulations that inhibit growth . . . then advocate with the appropriate agencies.” However, all of the institutions are then to “[e]nsure the business leaders’ circle hosts a regular forum with regulatory agency staff in an effort to discuss ideas for streamlining processes.” Among the roles assigned to the GCDC and the

county department alone are “support[ing] the formation of a Marcellus Shale Natural Gas Advisory Committee,” “provid[ing] input on regulation proposals at state and national levels,” and “[s]upport[ing] best management practices in Marcellus Shale natural gas extraction.” Then, “assuming available resources,” the five institutions “will . . . write and adopt a policy statement reflecting the sentiment that the development of natural resources in Garrett County should benefit Garrett County residents and the importance of public health and safety in the process.”

The plan states that it was developed over nine months, that “listening sessions” on nine economic sectors were held, and that the process was devised by an “executive committee” made up of representatives from the five institutions. The plan states that the GCDC and the County Board of Commissioners adopted it, and the other institutions were given a copy “for their information.” The minutes of the County Commissioners’ August 2, 2011 meeting reflect the commissioners’ vote to adopt the plan. The minutes also reflect an explanation by the county’s director of economic development that “[t]radition and past practice has been for the Board of County Commissioners to support the Plan as adopted by the organizations . . . .”

In responding, the GCDC provided us with its articles of incorporation and bylaws. The articles of incorporation show that the GCDC was incorporated in 1961 as a nonstock corporation. The stated purposes of the corporation included “to develop and advance the business prosperity and economic welfare of the County,” to “encourage and assist in the location of new business and industry in Garrett County,” “to obtain money and credit for and furnish the same to approved and deserving applicants for the promotion, development, or conduct of all kinds of business and industrial activity in said County,” “to finance the activities of this Corporation by the use of funds made available by various lending agencies, including, County, State, and Federal agencies,” and to engage in real property or personal property transactions “provided . . . that all monies . . . derived from the activities of the Corporation shall be primarily devoted in furtherance of the civic purpose referred to above.” Five people signed the articles of incorporation.

The bylaws, revised in 2013, provide for 24 voting members and an undefined number of “advisory” members. The advisory members include the County commissioners, the mayors of the eight municipalities in the county, and such others as the voting membership may select “to represent a specific organization.” Advisory members may not vote, may not serve as officers or directors, and do not count towards a quorum of the GCDC. The voting members nominate and select the voting and non-ex officio advisory members. The GCDC is governed by a nine-member board of directors, as elected by the voting members. The response explains that the GCDC now has 24 voting members and 44 advisory members. The response further

explains that the GCDC's former secretary filed articles of revival for the corporation when he was the County's economic development director and served as secretary after leaving that position, but that he is now a commissioner and has become an advisory member.

With regard to the GCDC's use of county office space, the response states that the GCDC lacks its own office space and that its members are unpaid volunteers. It appears from the GCDC's and the county's websites that two staff members from the county's economic development department perform tasks for the GCDC.

### **Additional facts**

The GCDC website recites this tangled history:

In 1961-1962 there was a voluntary organization known as the Garrett County Committee on Economic Development. A corporation was formed, which was to be known as the Garrett County Development Corporation (the "Development Corporation"), at the August 11, 1961 meeting of the committee. . . .

In 1969-1970, the corporation reorganized through the Community Action Committee (the "CAC") with a grant from the Office of Economic Opportunity (the "OEO"). This was a grant, which funded 100% of the salary and benefits for a director and secretary for one year. . . . Then Bausch and Lomb came to town! So another OEO grant was requested and approved. This time the grant, a 50-50 grant, was for two years and required a 50% match from the county. The commissioners provided this funding through CAC.

After this two-year period, OEO stopped funding economic development, and the county commissioners picked up the tab, funneling the funds through CAC. . . . At this time, county funds were given to the Development Corporation, which in turn paid the salaries, office expenses, etc.

In 1983, at the initiation of Commissioner Elwood L. Grove, II, the Development Corporation was abolished as a budget line entity in the county's budget and the Garrett County Department of Economic Development was created. Up to this time all economic development activities had been funneled through the Development Corporation, a duly formed non-profit corporation. There had been no county department.

After the county instituted its own economic development department, the website explains,

The Development Corporation then became an advisory entity, similar to the county's Planning Commission. The corporation was also used as a vehicle for borrowing money under Article 45A of the Annotated Code of Maryland. The Development Corporation was able to obtain funding much more quickly than the county commissioners. The corporation was able to obtain this funding, on an interim basis, with the full faith and credit of the county behind it, and could sidestep the normal strings attached to the county, such as bidding requirements. The funding for American H-V Testing (now known as Phenix Technologies) is a good example of how this worked.

<http://gcedc.weebly.com/about.html> .

To that history, we add the following: The "voluntary organization" to which the website refers was created and mandated by the General Assembly, with the enactment of Chapter 752 of the 1959 Laws of Maryland. That statute provided, in part:

The County Commissioners shall . . . appoint a Committee on Economic Development to be composed of five members . . . It shall be the duty of the Committee on Economic Development to assist . . . in the development of an overall program of economic development for Garrett County.

§ 7-8, Code of the Public Local Laws of Garrett County (1971) (Article 12 of the Public Local Laws of Maryland).

The 1959 statute also provided: "The County Commissioners in their discretion may engage the services of a company or agency to locate sites for industrial expansion and for industries seeking locations." *Id.* The entries for Garrett County's "Administrative Officers" in the 1961-62 Maryland Manual include a list of five members of the Committee on Economic Development, with a notation that the commissioners appointed them. Those five members were also the incorporators of the GCDC, and their signatures were witnessed by the County Clerk. Beginning with the 1964-65 Maryland Manual, the committee was no longer listed in the Maryland Manual. The GCDC was listed in the Maryland Manual in the late 1960s through the 1970s as part of the county government but had disappeared from that list by the mid-1990s. The county code does not now mention either the committee or the GCDC. Finally, the GCDC's chair advised our staff that the County Attorney did not view the GCDC as a county entity and that county therefore would not participate in the GCDC's response to this complaint.

### Discussion

The Act applies to “public bodies,” as that term is defined in the Act. *See* §§ 3-301 (stating the general requirement that public bodies meet in open sessions) and 3-101(h) (defining “public body”). As relevant to local-government entities, the Act sets forth two ways in which a group consisting of at least two people might be deemed a “public body.” Both focus on the way in which the group was created. Additionally, as we explained in 7 *OMCB Opinions* 195 (2011), the courts have deemed a nominally-private entity to be a “public body” when the governance and functions of the entity, viewed as a whole, are such that the entity is truly governmental in nature.

The first way for an entity to meet the statutory definition is to have been created by a State or local law, an executive order, or a rule, resolution, or bylaw. *See* § 3-101(h)(1)(ii).<sup>1</sup> Although the Committee on Economic Development was created by statute, the only facts available to us show that the GCDC was created by its incorporation as a private not-for-profit corporation. Perhaps the incorporation was once required by a resolution or other county measure; after all, the county listed the GCDC members among other county officials in the Maryland Manual for a period of time. At the same time, the statute authorized the commissioners to appoint a committee and to engage a company to provide services, but not to *create* that company. In any event, our limited research has not disclosed that any such resolution is now in effect, and none has been drawn to our attention.<sup>2</sup>

The second way for a group to meet the statutory definition, in relevant part, is to have been appointed by “the chief executive authority of a political subdivision of the State,” or by “an official who is subject to the policy direction of the . . . chief executive authority.” § 3-101(h)(2)(i). The GCDC was created by the filing of articles of incorporation by economic development committee members who might, or might not, have been “officials” subject to the commissioners’ policy direction, depending on the capacities in which the incorporators acted when forming the corporation. Now, however, the GCDC’s bylaws provide that its governing board is

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<sup>1</sup> Statutory references are to the General Provisions Article of the Maryland Code unless another article is specified.

<sup>2</sup> As illustrated by 9 *OMCB Opinions* 83, 85 (2013), where it was clear that a city’s committee had been created but not how it had been created, public bodies sometimes lose track of the method by which their various committees were created. As we pointed out there, the parent public body is in a much better position to do the necessary research than we are. Thus, in referring to some readily-available information about the GCDC, we do not suggest that there is not more information to be found. For example, for all we know, the Committee on Economic Development adopted a resolution that the committee members form the GCDC. More relevant here, however, is the governance of the GCDC as it is now.

elected by its members and is not appointed by county officials. Further, those officials may not vote and are powerless to change the bylaws. As currently constituted, the GCDC does not meet the second part of the definition, either.

Additionally, as we explained in 7 *OMCB Opinions* 195 (2011), the courts have deemed a nominally-private entity to be a “public body” when the governance and functions of the entity, viewed as a whole, are such that the entity is truly governmental in nature. As explained there, the key trait of the private entities that have been deemed “public bodies” for Open Meetings Act purposes is governmental control over the entity’s governance, as would be the case if the governmental entity had the power to appoint the entity’s board of directors or to dissolve the entity. *See id.* at 201; *see also City of Baltimore Dev’t Corp. v. Carmel Realty Assocs.*, 395 Md. 299, 326 (2006) (concluding that mayor’s appointment and removal powers over a nonprofit corporation’s board made it “in essence, a public body”). As the GCDC is currently structured, the voting members, not the county officials, control the bylaws, the make-up of the board, and, under the Maryland law on nonstock corporations, any decision to dissolve the corporation. *See Corporations and Associations Article* (2014 Repl. Vol.) §§ 5-201 *et seq.* If the GCDC was once created under county control, the county has now irrevocably ceded that control.

Another trait of nominally private entities that have been found to be public bodies is the operation of the entities to perform purely governmental functions. *See id.* at 200. The usual example of such an entity is the Salisbury Zoo Commission, privately incorporated by the City Attorney for the purpose of running the city’s zoo. *Andy’s Ice Cream, Inc. v. City of Salisbury*, 125 Md. App. 125, 146 (1999). The commission’s public function, however, was not by itself a trait that caused the court to deem it a “public body.” Instead, the court found that the appointment of the commission by the mayor and city council brought the commission within the section, now codified at § 3-101(h)(2)(i), that defines a public body as an entity appointed by the chief executive authority of a political subdivision of the State. In support of its conclusion that the definition should be read broadly to include an entity created by incorporation but controlled by a governmentally-appointed board, the court discussed the commission’s governmental functions and decided that those functions, in conjunction with the governmental control, brought it within the Act: “Its very purpose and the degree of control that the Mayor and City Council have over [it] indicate that [it] was organized and has functioned as an extension and sub-agency of the City government.” *Id.* at 157. After noting that the commission’s articles of incorporation did not “create actual autonomy,” but rather “place[d] organizational control in the governmental authority of the City,” the Court explained through an example that function alone is not determinative: “a hospital, although operated solely for the benefit of the public and not for profit, is nevertheless a private institution if founded

and maintained by a private corporation with authority to elect its own officers and directors.” *Id.* at 155-56.

We conclude that the GCDC, as currently constituted, does not meet the criteria for a “public body.” The Maryland Manual entries from the mid-1960s into the 1980s suggest strongly that the GCDC was at that time part of the county government. If so, however, the county has since ceded that control entirely; from the documents that have been provided to us, it does not appear that the county may now decide to pull the entity back into the county government. That said, we have relied on the bylaws as revised in 2013 and express no opinion on whether the GCDC was subject to county governance while the GCDC participated in developing the plan that the commissioners adopted in 2011.

We close by addressing the Complainants’ concerns that the 2011 plan, which includes broad-reaching statements of the county’s policies on various topics, was developed by the GCDC, the Chamber of Commerce, and other organizations behind closed doors and then presented to the commissioners’ with staff’s statement that “[t]radition and past practice has been for the Board of County Commissioners to support the Plan as adopted by the organizations . . . .” These facts pertain to the process that the county chose for the preparation of the plan and to the county’s choices as to which institutions should participate and which tasks should be delegated. The Open Meetings Act does not regulate those matters. The Act does not provide, for example, that economic development plans must be prepared in open meetings of public bodies. So, a governing body’s decision to give to a private group the opportunity to influence a decision does not turn the private entity into a “public body” under the Act.

Still, as evidenced by this complaint, the reported practice of delegating to selected non-governmental organizations the formulation of county policies, when coupled with a “tradition” of adopting the policies as presented, does not promote the Act’s purpose that “the public be allowed to observe . . . the deliberations and decisions that the making of public policy involves.” § 3-102(a). Most likely, private entities, given the opportunity to design the make-up of advisory committees and the focus of economic development efforts, will not on their own accord invite the general public into the discussion, if for no other reason than transparency is generally not a habit of the private sector. For that reason, a governing body that outsources the preparation of policy documents to a private entity should carefully consider the terms of the delegation.

**Conclusion**

We conclude that the GCDC is not now a “public body” subject to the Open Meetings Act. We therefore have no authority to address the complaint, and so we dismiss it. At the same time, we encourage public bodies that delegate substantial policy roles to selected private entities to consider conditioning the delegation on some measure of public access.

Open Meetings Compliance Board

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